In the Supreme Court

OF THE

United States

OCTOBER TERM, 1935

No. 929

[illegible] BENSON, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

REPLY MEMORANDUM ON BEHALF OF PETITIONER.

[illegible]

GEORGE R. ANDERSON,

[illegible]

Table of Authorities Cited

	Page
Andrews v. United States, 263 F.2d 608	1
Calvaresi v. United States, 348 U.S. 961	2
Campbell v. United States, 258 F.2d 160	1
Grunewald v. United States, 353 U.S. 391	3
Keenan v. Burke, 342 U.S. 881	2
McNabb v. United States, 318 U.S. 332	3
Roth v. United States, 255 F.2d 440	1
Shepard v. United States, 257 F.2d 293	1
Townsend v. Burke, 334 U.S. 76	2
United States v. Daugherty, 269 U.S. 360	2
Vetterli v. United States, 344 U.S. 852	2

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No. 929

HUGH BRYSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

REPLY MEMORANDUM ON BEHALF OF PETITIONER.

The Government's cavalier treatment of the Petition for Certiorari is unworthy of the serious questions presented.

1. We pointed out (Petition 27-28) that the question relating to limits upon the exercise of discretion in the imposition of criminal sentences is one which has been faced by at least three other Courts of Appeals within the past year. *Roth v. United States*, 255 F.2d 440; *Shepard v. United States*, 257 F.2d 293; *Campbell v. United States*, 258 F.2d 160; *Andrews v. United States*, 263 F.2d 608. From its Memorandum

in Opposition it would appear that the Government is not even aware of the existence of these cases. It certainly does not suggest that the question is not an important one.

2. We pointed out (Petition 19-20) that in at least five criminal cases, exclusive of contempt proceedings, this Court has reviewed and reversed sentences concededly within statutory limits. *United States v. Daugherty,* 269 U.S. 360; *Townsend v. Burke,* 334 U.S. 76; *Keenan v. Burke,* 342 U.S. 881; *Vetterli v. United States,* 344 U.S. 852; *Calvaresi v. United States,* 348 U.S. 961. The Government does not discuss or consider these cases, nor address itself to the questions raised by them. It simply repeats, as if by rote, the proposition that a sentence is not reviewable if it is within the permissible statutory limits. But each of the cases cited is an explicit holding to the contrary.

3. We pointed out (Petition 24-28) that the trial judge was guilty of an arbitrary and capricious refusal to exercise judicial discretion. To this the Government makes the same routine response. But that response is clearly inadequate, for even when a judge is granted a discretionary power, he may not abuse it by arbitrary and capricious action. The Government does not attempt to justify the sentence here. Indeed, it concedes that a lesser penalty might have been imposed. (Memo. p. 2.) It simply says that no matter how indefensible was the action of the trial Court, this Court can do nothing about it.

We think the cases we rely on, plus this Court's general supervisory power over inferior federal

tribunals (*Cf. McNabb v. United States*, 318 U.S. 332; *Grunewald v. United States*, 353 U.S. 391) establish the contrary. In any case, we think our petition merits a more considered response than the Government has made.

We urge that the writ be granted and the case reviewed by this Court.

Dated, San Francisco, California,
June 12, 1959.

Respectfully submitted,
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